Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD E. SCHLOESSER, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether there is sufficient evidence of record to support the petitioner's conviction for possession of cocaine as a matter of law.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Richard E. Schloesser, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered on 22 September 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, is reported at 40 M.J. 453 (C.M.A. 1994), and reprinted at Appendix A. The decision of the United States Air Force Court of Criminal Appeals, is unpublished ACM 29193 (AFCMR 1993), and is reprinted at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 22 September 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1993) and 10 U.S.C.A. § 867(a) (Supp. 1993).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

In June 1990, Ms. Linda Rodriguez, formerly a commander's secretary, was working as an investigative assistant for the Air Force Office of Special Investigations (AFOSI). R. 83-84. As an investigative assistant, her job was to handle the typing and the evidence. R. 70. On 9 June 1990, she was the lead operative, working with the Joint Drug Enforcement Team (JDET), in a reverse sting operation. R. 71. At that time, she had been working for the AFOSI for less than a year. R. 84. Her preparation for this operation consisted of watching a video and being briefed by SA Bond, the team leader. R. 71-72.

During the operation, Ms. Rodriguez was accompanied by Sergeant Maria Ayreen Desagun who had been working with JDET for about a month. R. 107. Ms. Rodriguez and Sergeant Desagun went to the Kelly Air Force Base (AFB) Noncommissioned Officer's (NCO) Club. R. 72. Finding that club to be "pretty dead," the two women left and went to the Lackland AFB NCO Club. R. 72.

Once in the Lackland NCO club, Ms. Rodriguez ordered a drink (usually a coke). R. 73. Noticing that the petitioner was standing alone by the bar, Ms. Rodriguez approached the petitioner and asked him to dance. R. 73. After dancing with the petitioner, Ms. Rodriguez ordered another coke. R. 74. On her way back from the bar, the petitioner asked Ms. Rodriguez if she was alone. R. 74. Ms. Rodriguez asked the petitioner if he liked to party,

and the petitioner indicated he liked to party. R. 74-75. The petitioner bought Ms. Rodriguez two bourbon and cokes, but she could not remember drinking them. R. 97.

After a short discussion, Ms. Rodriguez asked the petitioner if he had any cocaine on him and he stated he did not. R. 75. She responded, "Well, Ayreen and I have some in our car and if you would like. Well, Ayreen and I are going to do a few lines in the car later on." R. 75. Sergeant Desagun returned to the table and the two women went to the restroom. R. 76. Upon returning to the table, Ms. Rodriguez noticed the petitioner talking with another man. R. 76. Ms. Rodriguez then said to Sergeant Desagun, "Well, do you want to go do a few lines in the car?" R. 76. Ms. Rodriguez then added that, the petitioner's friend should not join them. R. 76.

The petitioner and the two women went out to the car the women had arrived in. R. 78. Ms. Rodriguez sat in the driver's seat and the petitioner sat in the front passenger's seat. R. 78. Sergeant Desagun sat in the back seat between the petitioner and Ms. Rodriguez so she could see what was going on. R. 111. Ms. Rodriguez reached across the petitioner and opened the glove compartment and removed a bag. R. 78-79. The bag contained four ¼ gram baggies of cocaine, four ¼ gram baggies of methamphetamine and two baggies of marijuana. R. 79.

Ms. Rodriguez testified that she took a bag of marijuana out of the bag of drugs and stated "this is bad stuff" as she threw it in the back seat. R. 79. She stated that Sergeant Desagun reached over and handed the bag of marijuana to the petitioner. R. 79. Ms. Rodriguez eventually removed one of the four plastic baggies supposedly containing .25 grams of cocaine. R. 79. At the pretrial hearing, Ms. Rodriguez stated that the cocaine was wrapped in foil, at trial she testified that the cocaine was in

a plastic bag. R. 88. Ms. Rodriguez held the cocaine between herself and the petitioner and said, "So show me how to use it." R. 80.

Sergeant Desagun testified that Ms. Rodriguez removed both bags of marijuana from the white bag of drugs. R. 111. Sergeant Desagun stated at trial that Ms. Rodriguez handed the bags of marijuana to Sergeant Desagun, and Sergeant Desagun placed the marijuana back into the white bag. R. 111. Sergeant Desagun remembers the petitioner reaching into the white bag, opening a bag of marijuana, and smelling it. R. 111. However, Sergeant Desagun, like Ms. Rodriguez, does not remember how the baggie ended up on the petitioner's thigh. R. 111.

The petitioner asked if either woman had a driver's license, and both pretended they did not. R. 80. With the small baggie allegedly on his left thigh, the petitioner then removed his military identification (ID) card and a five dollar bill from his pocket. R. 80. Ms. Rodriguez noticed that the petitioner had his ID card and the five dollar bill in his hand, and the baggie on his left thigh. R. 80. Ms. Rodriguez could not recall how the cocaine got onto the petitioner's thigh. R. 80. THe five dollar bill was too wrinkled to act as a straw, so the petitioner asked the women if they had a crisper bill. R. 80. Sergeant Desagun handed a crisp one dollar bill to the petitioner and he began to roll it into a straw-like device. R. 80.

As the petitioner was completing the straw, Ms. Rodriguez stepped on the brakes, the prearranged signal for the AFOSI agents to make the bust. R. 80. Ms. Rodriguez does not remember how the baggie got onto the petitioner's leg, but she is certain that she did not give it to him "because that is what I am told by Dave Bone." R. 89. Ms. Rodriguez admitted that she had "messed up" investigative assignments in the past. R. 89. She also recognizes

that how the baggie got on the petitioner's leg is important; but she does not recall how it got there. R. 104.

After the petitioner was apprehended, he was interrogated by, among others, Mr. Riffle. R. 156. Mr. Riffle testified that the petitioner told him the petitioner had taken the cocaine and placed it on his lap. R. 163. This statement was absent from the written statement prepared for the petitioner following the interrogation, and absent from both the official notes of the interview and the agents notes of the interview. R. 165. Mr. Riffle testified that he did not believe everything the petitioner told him that night and ". . . couldn't tell if he was telling me the truth or not." R. 168.

The petitioner testified that he did not take the cocaine from anyone that night. R. 176. The first time he noticed the baggie on his left thigh was when Special Agent Bone opened the car door and the light came on. R. 177. Like Ms. Rodriguez and Sergeant Desagun, the petitioner did not know how the baggie got on his thigh. R. 180.

The petitioner was charged with possession of .7 grams of cocaine. On 14-15 January 1991, the petitioner was tried, convicted, contrary to his pleas, and sentenced by a general court-martial of officer members. The petitioner's approved sentence was a bad conduct discharge, confinement for three months, and reduction to airman basic (E-1). On 4 January 1993, the United States Air Force Court of Military Review affirmed the findings and sentence (Appendix A). On 7 July 1993, the Court of Appeals for the Armed Forces specified the issue presently raised for review. On 22 September 1994 that Court affirmed the lower court's decision. (Appendix B).

Other facts necessary to the disposition of this issue are set forth in the argument, *infra*.

REASON FOR GRANTING THE WRIT

THE EVIDENCE OF RECORD IS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT PETITIONER'S CONVICTION FOR POSSESSION OF COCAINE.

"A society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *In re Winship,* 397 U.S. 358, 363-364, 90 S.Ct. 1068, 1072 (1970). The test for legal sufficiency of evidence is, "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The United States Supreme Court identified the origin of the *Jackson* standard when it announced:

> This is the first of our cases to expressly consider the question whether the due process standard recognized in *Winship* constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt.

Jackson, 99 S.Ct. at 2781. However, two earlier cases are also of note.

As early as 1942, the Supreme Court recognized that "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 469 (1942), *citing, United States v. Manton,* 2 Cir., 107 F.2d 834, 839. However, in 1960, the Supreme Court seemed to backtrack when it stated that a

Due Process inquiry is not premised upon "sufficiency of the evidence, but on whether [the] conviction rests upon any evidence at all." *Thompson v. Louisville,* 362 U.S. 199, 80 S.Ct. 624, 625 (1960).

Ten years later, the Court decided *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068 (1970), in which it recognized that "the reasonable-doubt standard plays a vital role in the American scheme of criminal procedure." *Id.,* 90 S.Ct., at 1072. The Court stated that the beyond a reasonable doubt standard "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of our criminal law.' " *Id., citing, Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481 (1895). After completing its analysis of the importance of the beyond a reasonable doubt standard in American criminal law, the Court held,

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Id., 397 U.S., at 366.

Subsequent to *Winship,* but prior to *Jackson,* appellate courts "generally assumed that so long as the reasonable-doubt instruction [was] given at trial, the no-evidence doctrine of *Thompson v. Louisville* remain[ed] the appropriate guide for a federal habeas corpus court to apply." *Jackson v. Virginia,* 99 S.Ct., at 2787. The Supreme Court disagreed with this premise and found the no-evidence standard "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt." *Id.,* 99 S.Ct., at 2789.

The Court announced the standard of review when deciding federal habeas corpus petitions was whether, "after viewing all of the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* The Court of Appeals for the Armed Forces applies this standard to review issues of legal sufficiency of evidence on direct appeal. *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987).

This standard, though seeming simplistic, has not been uniformly applied. A starting point in applying the *Jackson* test is determining what evidence to consider. The test itself mentions "all of the evidence." Many state courts have determined that this means the reviewing court must consider all evidence, not just that evidence consistent with guilt.[1] New York's criminal procedure statute requires a like review,[2] as does criminal procedure in Great Britain.[3] This is the appropriate application of the *Jackson* standard.

Considering all evidence, as opposed to only that evidence consistent with guilt is necessary to determine whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." To disregard all evidence inconsistent with guilt is to return to the no-evidence standard rejected in *Jackson v. Virginia.*

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[1] *See, e.g., State v. Golden,* 216 Minn. 97, 12 N.W.2d 617, 619 (1943); *Spangler v. Commonwealth,* 188 Va. 436, S.E.2d 265, 266 (1948); and *People v. Kincy,* 72 Ill.App.2d 419, 219 N.E.2d. 662, 665-666 (1966).

[2] New York Criminal Procedure Law § 470.15.

[3] M. Zander, *Cases and Materials on the English Legal System,* 420 (1973).

An accused is entitled to more than a "trial ritual." *Jackson,* 99 S.Ct., at 2788. A review of a criminal conviction for Due Process purposes requires a review of all evidence in order to determine whether or not the trier of fact "rationally appl[ied]" the reasonable doubt standard. *Id.*

Applying the *Jackson* standard to this case leads to a finding that the evidence is insufficient, as a matter of law, to support the conviction of cocaine possession. The government was required to prove that the appellant possessed some amount of cocaine, and that the possession was knowing and conscious. R. 217. The government failed on each element.

The government failed to present proof beyond a reasonable doubt that the substance found on the petitioner's thigh was, in fact, cocaine. The proof at trial did not support the proposition that what was found on the petitioner's leg was the same substance which was presented at trial.

Ms. Rodriguez testifed that she had a ¼ gram baggie of cocaine. R. 79.[4] Actually, the government failed to establish that the baggie found on the petitioner's leg contained cocaine. SA Bone testified that he obtained 30 grams of a substance he believed to be cocaine. R. 154. The batch from which SA Bone removed this substance was later identified as cocaine of an undisclosed purity, but no tests were done on the 30 grams SA Bone had obtained. R. 155.

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[4] This ¼ gram reference was consistent with the Article 32 testimony of Sergeant Desagun and Special Agent Bone. However, Special Agent Bone and Sergeant Desagun, at trial, dropped any reference to the quantity of cocaine the women brought with them that evening. Likewise, Special Agent Bone, who testified at the Article 32 hearing that he had a log showing precisely how much cocaine the women had with them, never produced this document.

At the close of the government's case, why the two OSI operatives began with a ¼ gram bag of cocaine, while the contents of the bag seized from the appellant weighed .7 grams, remained unexplained. Likewise, no evidence was introduced to explain why the contents of the baggie seized from the petitioner weighed .7 grams, while the contents of the baggie which was tested and presented at trial weighed .49 grams. Pros.Ex. 1. The laboratory report notes that .49 grams of cocaine were found. Pros.Ex. 1. The evidence tag on the baggie at trial notes .7 grams of cocaine. The only evidence presented to connect the .49 gram baggie to this charge was SA Bone's statement that he had placed a dated and initialled "small sticky piece of paper" on the seized bag. R. 149.[5] The baggie at trial bore a sticky piece of paper.

Initially, the testimony at trial eluded only to .25 grams of cocaine being involved. Later this figure nearly triples to .7 grams of cocaine and is then reduced by a full 30% to .49 grams. SA Bone testifed that he still has the 30 grams of cocaine he started out with on the night in question, and that it was in his evidence locker. R. 156. The government's evidence is that they took 30 grams of a substance thought to be cocaine. The government never tested the 30 grams. R. 156. The government started a reverse sting operation with a baggie containing .25 grams of cocaine. The government seized a baggie containing .7 grams of a substance. The government tested a baggie containing .49 grams of cocaine. Pros.Ex. 1. After all was said and done, they still had the original 30 grams in evidence lockup. R. 156.

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[5] Likewise, the government's proof that this baggie contained cocaine was weak. Pros.Ex. 1 identifies a baggie containing a bottle, containing a baggie, containing white powder. The exhibit then states that the substance found was .49 grams of cocaine. What contained .49 grams of cocaine – the outer baggie, the bottle, the smaller baggie, or the white powder, is not clear.

No reasonable trier of fact could conclude that the government had satisfied its burden of proving beyond a reasonable doubt that the baggie seized from the petitioner contained cocaine. The government tested the source of the 30 grams from which the .25 gram baggie was drawn. The government tested a .49 gram baggie. But the government produced no evidence of what was in the .7 gram baggie seized from the petitioner.

The government also failed to prove beyond a reasonable doubt that the petitioner knew that the cocaine was in his possession. Of the three persons present in that vehicle on the night of the incident, none could tell the trier of fact how the baggie got onto the petitioner's leg.

Three people were present in the government vehicle on 9-10 June 1990—Ms. Rodriguez, Sergeant Desagun, and the petitioner. Ms. Rodriguez sat in the driver's seat, Sergeant Desagun behind and between the two front seats, and the petitioner sat in the front passenger's seat. R. 78.

Ms. Rodriguez, with her limited experience and training, had blemishes on her short track record as an AFOSI operative. R. 89. She testified that she did not remember how the bag seized from the petitioner's leg ended up there. R. 80. But, she was certain that she had not given the baggie to the petitioner, because that is what SA Bone had told her not to do. R. 89. Notably, SA Bone also told her that it was important that she not invite the petitioner to use drugs, yet Ms. Rodriguez asked the petitioner at the beginning of the reverse sting, "Ayreen and I have some (cocaine) in our car and if you would like," that is what she ended up doing. R. 101, 75.

Sergeant Desagun, having only worked with JDET for less than a month at that time, was less experienced than Ms. Rodriguez. R. 107. Sergeant Desagun's purpose that evening was to observe what happened in the front seat.

R. 121. From her vantage point Sergeant Desagun "could see pretty much what was going on," R. 111, yet, she did not see how the baggie ended up on the petitioner's leg. R. 111.

The only bit of evidence to prove this element came from Mr. Riffle. He was one of the agents who interviewed the petitioner after his apprehension. R. 159. Mr. Riffle wrote up a statement for the petitioner to sign based on the petitioner's interview. Def.Ex. A for identification. Mr. Riffle testified that the petitioner stated he wanted to use cocaine with Ms. Rodriguez and Sergeant Desagun. R. 161. Mr. Riffle also testified the petitioner stated he had no intention of using cocaine with Ms. Rodriguez and Sergeant Desagun. R. 169.

Mr. Riffle stated that the petitioner made an oral statement that he had taken the "cocaine willingly and lay [sic] it on his lap." R. 163. Mr. Riffle stated he was "absolutely sure" the petitioner said this. R. 163. This crucial statement of the petitioner's did not make it into Mr. Riffle's official report of the interview. R. 165. Likewise, the statement did not make it into the written statement which Mr. Riffle prepared based on the petitioner's oral statements. R. 165. This evidence was not offered at the Article 32 hearing. This essential evidence, unlike the petitioner's requests to use the restroom, did not even make it into Mr. Riffle's written agent's notes of that evening. R. 165.

Mr. Riffle testified that "an an investigator, [he has] to decide what to believe and what not to believe." R. 168. Mr. Riffle testified that while he didn't believe everything the petitioner told him during the interview, he didn't disbelieve anything either. R. 168. Mr. Riffle admitted he could not tell whether or not the petitioner was telling the truth. R. 168.

Unfortunately, Sergeant Schloesser, who testified on the merits and denied taking the cocaine into his possession that evening, could not explain how it got on his person either. R. 173-181, 176. His first knowledge that the baggie was on his leg was when SA Bone opened the car door and the interior lights came on. R. 177. The petitioner stated he gave an oral statement to the AFOSI because he wanted to cooperate and had been told he was an "innocent bystander" of an "FBI sting operation" to get the two women involved. R. 178. Upon learning he had been lied to, the petitioner stopped the interview by requesting counsel. R. 178.

On cross-examination, the petitioner again denied any knowledge of how the baggie got on his leg. R. 180. He admitted it would be easy to say Ms. Rodriguez placed it there, but that he honestly did not remember how it got there. R. 180. The petitioner stated he was so absorbed in rolling up the dollar bill that he did not even notice SA Bone looking in the window. R. 180. Given this level of attention to the dollar bill, it was entirely likely that the petitioner would not notice a small baggie being placed on or landing on his leg. R. 180.

The petitioner sat in front of the glove compartment, as Ms. Rodriguez retrieved a large bag of various drugs from it. Ms. Rodriguez took two smaller baggies of marijuana from the large bag. She three the bags of marijuana behind her and then, held the baggie allegedly containing cocaine between herself and the petitioner. There was ample opportunity for the baggie to accidentally end up on the petitioner's leg without his knowledge.

Even under the no-evidence standard rejected by the Supreme Court in *Jackson v. Virginia,* the petitioner would prevail. The government presented no evidence that the baggie containing .7 grams of some substance was ever

tested. The evidence showed that the AFOSI started with .25 grams of a substance derived from a 30 gram sample of a certain stock, which stock later tested positive for the presence of cocaine. Neither the 30 grams nor the .25 grams were tested.

The government established that the contents of the baggie seized from the petitioner weighed .7 grams. But the evidence at trial consisted of a baggie containing a bottle containing a baggie of a white powder which was tested and .49 grams of cocaine were found.

Assuming, *arguendo,* that the substance in the baggie seized from the petitioner contained cocaine, the government failed to produce any substantial evidence that the petitioner knowingly possessed this baggie. When analyzing the substantial evidence standard, one court asked is the evidence "solid, substantial, and does it reasonably inspire confidence in the defendant's guilt?" *People v. Blakeslee,* 2 Cal.App.3d 831, 839, 82 Cal.Rptr. 839, 844 (1969). Another factor the court considered was the "absence of evidence we would normally expect to find." *Id.* Looking at this case in those terms, the interest of due process is not served by allowing this conviction to stand.

The evidence at trial established that the JDET used two women on 9 June 1990 to perform a reverse sting operation. Once they invited the petitioner into their vehicle, Sergeant Desagun's main role was to observe the transaction—to watch how the petitioner came into possession of the cocaine. R. 121. But, when all was said and done, Sergeant Desagun failed to see this seminal part of the transaction take place. Ms. Rodriguez was told not to hand the cocaine to the petitioner, but to make him take it. Yet, she couldn't remember how the cocaine got from her own hand to the petitioner's leg.

The government agents who interviewed the petitioner on 10 June 1990 made a written statement, based on the

agents' notes of the interview. Def. Ex. A. This statement contained no reference to how the petitioner obtained possession of the baggie. Mr. Riffle testified that, although not an expert in what to disbelieve, as an investigator, he had to "decide what to believe and what not to believe." R. 168. Mr. Riffle also admitted that what he determined believable was reflected in his investigation report. (Def. Ex. A. for identification). R. 168.

In certain particulars Mr. Riffle's testimony was contradictory. He was rather quick to point out on direct examination that the petitioner stated that the petitioner told Ms. Rodriguez and Sergeant Desagun that he did not have any money to buy cocaine but that he wanted to use cocaine with them. R. 161. However, the two female operatives did not testify to this statement. Further, the petitioner's written statement only reflects that the petitioner said he had no money. Def. Ex. A. for identification. Mr. Riffle later stated that the petitioner told him the petitioner had no intention of using cocaine with Ms. Rodriguez and Sergeant Desagun. R. 169. Unlike his statement that the petitioner desired to use cocaine that evening, this part of Mr. Riffle's testimony is supported by the written statement he prepared. Def. Ex. A for identification.

Finally, Mr. Riffle stated the petitioner told him that the petitioner had taken "possession of the cocaine willingly and lay [sic] it on his lap." R. 163. Mr. Riffle did, however, admit that he did not know where the petitioner got the baggie. R. 167. Likewise, Mr. Riffle testified that the petitioner's statement regarding how he got the baggie, unlike the petitioner's request to use the restroom, did not make it into the written statement he prepared for the petitioner, it did not make it into the official report, and it

did not even make it into his agent's notes.[6] The sudden memory of an agent who did not even testify at the Article 32 hearing, that more than seven months later he remembered a vital piece of information, but had never written this information down is beyond belief.

Mr. Riffle testified that he did not know what to believe. R. 168-169. Upon reading Mr. Riffle's testimony, any rational trier of fact is left with the same conclusion – no one could possibly know what to believe, especially when the burden of proof is proof beyond a reasonable doubt.

In reaching its decision to affirm the conviction, the Court of Appeals for the Armed Forces relied upon this bit of evidence from Mr. Riffle, while admitting, that some might see the credibility of this revelation undermined somewhat by Mr. Riffle's curious lapse of memory as to whether the petitioner took the baggie from Ms. Rodriguez or from the console. 40 MJ at 455. In its opinion upholding the conviction, the Court also noted that Ms. Rodriquez' testimony that she was sure that she did not put the baggie on the petitioner's thigh, dovetailed with Mr. Riffle's testimony that petitioner said he took it willingly, and the actions of the petitioner in rolling the straw also tend to support his having knowledge of its presence. The Court of Appeals for the Armed Forces erred in upholding this decision on the basis of essentially one piece of evidence from a witness, whose credibility was debatable.

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[6] Presumably this statement did not make it into the notes of any of the other agents present either or the government would have produced these notes at trial.

CONCLUSION

Even when viewing portions of the government's case in the light most favorable to the government, the petitioner's knowledge of the presence of the baggie on his leg is highly suspect. No rational trier of fact could be satisfied that this evidence proves the petitioner's guilt beyond a reasonble doubt. The *Jackson v. Virginia* standard of review requires the appellate courts to consider *all* the evidence. The no-evidence standard was specifically rejected by the Supreme Court in *Jackson v. Virginia,* 99 S.Ct., at 2789. To sustain a conviction, the government must present substantial evidence which would convince a rational trier of fact beyond a reasonable doubt.

The only evidence reflecting any light on the petitioner's knowledge of the presence of the baggie on his leg came from Mr. Riffle. But even considering this we are left with not more than a suspicion of the petitioner's guilt. This evidence is not substantial evidence sufficient to save this conviction from failure.

Respectfully submitted,

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December 1994

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-0724
CMR No. 29193

UNITED STATES, APPELLEE

v.

RICHARD E. SCHLOESSER, SERGEANT
U.S. AIR FORCE, APPELLANT

Argued April 6, 1994
Decided Sep. 22, 1994

Counsel

For Appellant: *Captain Robert I. Smith* (argued); *Colonel Jay L. Cohen* (on brief); *Colonel Terry J. Woodhouse* and *Lieutenant Colonel Frank J. Spinner.*

For Appellee: *Major Barnard N. Madsen* (argued); *Colonel Jeffery T. Infelise* (on brief).

Military Judge: Robert N. Spencer

Opinion of the Court

WISS, Judge:

On June 10, 1990, appellant was caught in a reverse

sting operation * by two "investigative assistant[s]" working with the Joint Drug Enforcement Team (JDET). The operation netted a general court-martial conviction of appellant, after a contested trial, for possession of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a, and sentence extending to a bad-conduct discharge, confinement for 3 months, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Military Review affirmed in an unpublished opinion.

On appellant's petition for review on the merits, this Court specified the issue of whether the evidence was sufficient as a matter of law to sustain appellant's conviction. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979). Now, after full consideration, we hold that it was.

I

Linda Rodriguez, formerly a commander's secretary, was an investigative assistant with the Air Force Office of Special Investigations (OSI) whose duties were to provide administrative support, including handling evidence and typing agent's reports of investigation, In June 1990, however, Rodriguez was working with the JDET as part of a reverse sting operation with Sergeant Maria Ayreen Desagun, a "security policewoman" working with the OSI. As of that date, Rodriguez had worked for OSI for less than 1 year, and Desagun had worked for JDET for about a month. The extent of Rodireguez' preparation for the operation that snared appellant was to watch a video on

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* Investigator Rodriguez defined a "reverse sting operation" as one in which subjects "say that they use drugs, they name the drug, they bring up the subject, and yet they do not have the drug on themselves. Then I offer and say that we do have the drugs with us."

entrapment and get briefed by the team leader, OSI Special Agent Bone.

Accoring to the prosecution's evidence at trial, the following description of the relevant events unfolded. About 11:30 on the night of June 10, the two women arrived at the Lackland Air Force Base Noncommissioned Officers Club, parked their car in a lighted area of the parking lot, and entered the club. After ordering drinks, they decided to "let people know that we're single and we're available" by "mingl[ing] with the crowd and maybe ask someone to dance with us. . . ." That lucky "someone" was appellant.

The two danced to "maybe two or three songs" and then parted company. After a short while, however, they reconnected and "talked . . . for a little while." At some point, Rodriguez asked appellant, "Do you like to party?" Appellant suggested they return to Rodriguez' table; once there, she asked, "So what do you like to do?" Appellant answered, "Well, coke is my favorite." After some small talk, Rodriguez asked apellant, "Do you have any cocaine on you?", and he replied, "No." Prepared for such a potential dead-end, however, Rodriguez responded:

> Oh, well Ayreen and I have some in our car and if you would like. Well, Ayreen and I are going to do a few lines in the car later on. That is what we usually do at night; we do a few lines in the car.

Ultimately, the three left the club and went to the women's car in the parking lot—though Rodriguez claimed that she did Not "specifically invite" appellant either to go with them or to use cocaine with them. There, Rodriguez sat behind the wheel, Desagun in the back seat, and appellant in the front passenger seat.

Once all three had entered the car, Rodriguez reached over and removed from the glove compartment a plastic

bag containing their drugs. After first pulling out a baggie of marijuana and tossing it into the back seat with the explanation that " 'this is bad stuff,' " she pulled out a small bag of cocaine and said to appellant, "So show me who you use it." Appellant pulled from his back pocket his military identification card and a $5 bill.

At this point, the baggie of cocaine was "sitting right on [appellant's] left thigh." Rodriguez was "sure" that she "did not put it there," but she did not "remember" how it ended up on his thigh. Neither did Desagun "see how it got there[.]"

Appellant folded the $5 bill at one end and began "to roll it up," but it was "too wrinkled." Appellant asked if either of the women had a "newer" bill. Rodriguez described the ensuing events as follows:

> A. Ayreen hands over a dollar bill to the accused, which is a newer bill. So the accused again folds one end of the dollar bill and he starts rolling it up, and by the time he finishes it looks like a thin straw. I am looking at him and he said he learned this a few years back. As I'm looking at him, he's got the ID card and the straw—I mean the dollar bill that looks like a straw and the cocaine on his left thigh.
>
> Of course, we have the drugs between us as we're sitting in the car. We have the arm [armrest between the two front seats] down and the drugs are between us. At that time I felt that we had sufficient evidence on the accused. We have a prearranged signal that I signal for the agents.
>
> Q. Let me stop you there in time. I want to ask one other question that comes before your prearranged signal.
>
> A. Yes, sir.

> Q. It deals with where you were going to use the cocaine. Was there any discussion about that during your conversations in the car?
>
> A. Yes, sir, there was. Subject had the straw in his hand and I asked subject, I said—we're kind of looking around the corner and we're like, well where should we line it up, and I said, "How about the dash," because I have known since I have been working with JDET I've heard that line before, and I thought well maybe it sounded like a good one, so I said, "How about the dash," and he agreed.
>
> * * *
>
> Q. Again, at that point in time when you signaled for the agents, where was the cocaine?
>
> A. The cocaine was on his left thigh.
>
> Q. Who put them there? Did you put them there?
>
> A. No, sir, I did not.

Later, during redirect examination and after being given the opportunity to refresh her recollection of her testimony during the Article 32, UCMJ. 10 USC § 832. hearing, Rodriguez testified about the testimony as follows:

> I could not recall how Sergeant Schloesser ended up with the cocaine, but I am certain that he had to have reached over, because I had it in my possession.

The morning after appellant had been apprehended, Investigator Riffle of the JDET interviewed him. After advising appellant of his rights and securing appellant's waiver of them, Riffle took appellant's verbal statement concerning the events leading to his apprehension. During his direct testimony, Riffle was asked by trial counsel whether appellant had "describ[ed] . . . how he came into

possession of cocaine[,]" and Riffle answered:

> He said that he did receive the cocaine, whether it was from Linda or [the] console I can't remember but he in fact did take possession of the cocaine willingly and lay it on his lap.
>
> Q. And you are absolutely sure he said that?
>
> A. Yes, I am.

Curiously, this purported oral admission by appellant neither appears in the written statement which was prepared by Riffle based on appellant's oral statement nor is reflected in the agent's notes or official report of the interview.

II

The operation that bagged appellant is not an epitome of law enforcement. Notwithstanding that the evidence is legally sufficient under our standard of review of *Jackson v. Virginia, supra,* it is important to note candidly how this prosecution for mere possession of cocaine came close to unraveling because of lack of attentiveness by the relatively inexperienced operatives during the sting.

The cocaine belonged to government operatives who lured appellant to their car, and there was no evidence offered by anyone present in that car that appellant ever handled the cocaine. Even for a green operative like Rodriguez, it is hard to imagine why it would not be important for her to notice and to remember how the contraband ended up simply resting on appellant's left thigh—it goes to the very essence of appellant's "possession"; yet, while she does remember other details of that evening, she had no recollection of that critical fact. Sergeant Desagun, who was "there observing what happened," was equally mystified: "Obviously, I just missed it."

Enter, stage center: Investigator Riffle. This more experienced investigator—who saw nothing of what happened in the car due to his vantage point on stake out—conveniently offers up the missing piece to the puzzle. From the horse's own mouth, Riffle testified, came the admission that appellant took "possession of the cocaine willingly and lay it on his lap."

The credibility of this revelation, as a factfinding matter, might be seen, by some, as undermined somewhat by Riffle's curious lapse of memory as to whether appellant took "possession" "from Linda or [the] console"—which may not have legal significance but which might make one at least pause before fully accepting at face value Riffle's memory of that conversation. In addition, this important admission never made its way onto paper—either in the form of the written statement prepared by Riffle, in the body of the agent's notes, or in his report of that interview.

Still, as just mentioned, these are issues properly to be resolved by the factfinders, and they indicated their resolution by the findings of guilty. The evidence—viewed in the light most favorable to the prosecution—is there, in the record, from which a reasonable trier of fact could conclude beyond a reasonable doubt that appellant knowingly possessed the cocaine. *See Jackson v. Virginia, supra; United States v. Turner,* 25 MJ 324 (CMA 1987). While Rodruguez could not remember how the cocaine came to rest on appellant's thigh, she was sure she did not put it there. The inference from this that appellant himself picked it up and put it there dovetails with Riffle's testimony that appellant admitted that he had taken "possession of the cocaine willingly and lay it on his lap." Additionally, appellant's actions in preparing a straw from a currency bill through which to sniff the cocaine offers further evidence that could assure a factfinder that, as

appellant was then immediately prepared to use the drug, its resting place on his thigh constituted knowing possession. *Cf. United States v. Mance,* 26 MJ 244, 253 (CMA) ("[A] person does not possess a substance unless he is aware of its presence. If someone slips a drug into a servicemember's pocket without his being aware thereof . . ., then he lacks the 'knowledge' requisite for possession."), *cert. denied,* 488 U.S. 942 (1988).

III

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

APPENDIX B

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 29193

UNITED STATES

v.

SERGEANT RICHARD E. SCHLOESSER, FR243-27-6123
UNITED STATES AIR FORCE

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4 January 1993

Sentence adjudged 15 January 1991 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Robert N. Spencer.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Major Ronald A. Gregory.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis, Major Ann M. Mittermeyer, Major Paul H. Blackwell. Jr., and Captain Carlos L. McDade.

Before

DIXON, MCLAUTHLIN, and HEIMBURG
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, Sergeant Richard E. Schloesser was found guilty of possessing cocaine by a general court-martial that sentenced him to a bad-conduct discharge, confinement for 3 months, and reduction to E-1. The convening authority approved the sentence as adjudged. We find no merit in the errors asserted on appeal and affirm.

The essential facts in this case are undisputed. The appellant was performing temporary duty at Lackland Air Force Base, Texas, and decided to visit Lackland's Non-commissioned Officers' (NCO) Club one evening. In the Club's bar, the appellant was approached by a woman who asked him to dance. Unfortunately for the appellant, the woman was an undercover agent for the local Joint Drug Enforcement Team (JDET). She said she selected the appellant simply because he was "standing there by himself." Later that evening, the two struck up a conversation and she asked him if he "liked to party." The appellant told the agent, and a second female agent posing as her friend, that he liked "coke." Eventually, the appellant wound up with both agents in their car in the NCO Club parking lot. One of the agents produced a small bag of cocaine from the vehicle's glove compartment and the appellant started fashioning a "cocaine fold" from a dollar bill for inhaling the drug. When the agent in the driver's seat tapped the car's brake lights, the waiting JDET members rushed the vehicle. Both agents in the car and a member of the arresting team saw the "cocaine fold" in the appellant's hands and the unopened bag of cocaine on his leg. At trial, the appellant denied intending anything improper other than trying to impress the two women. He insisted he did not know how the bag of cocaine got on his leg and argued he may have been entrapped.

Here, the appellant asserts the "overzealous actions" of law enforcement personnel involved in his case "are inconsistent with fundamental notions of fairness" and "offend due process." Assuming, *arguendo,* this issue survives a failure to raise it at trial, we find no infringement of due process in the facts before us. Fundamental fairness will not permit an accused to be convicted of a crime in which police conduct was truly outrageous or intolerable. *United States v. Russell,* 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1966); *United States v. Harms,* 14 M.J. 677 (A.F.C.M.R. 1982); *United States v. Simmons,* 14 M.J. 624 (A.F.C.M.R. 1982). While perhaps not representing the most constructive use of our drug interdiction resources, the "reverse sting" conducted here was no glaring excursion from the bounds of legitimate government activity. Undercover drug operations serve a clear social objective and are an accepted and necessary means of detecting typically secretive drug offenders. *Harms,* 14 M.J. at 679. In light of clear and compelling evidence in the record that the initiative and intent to possess cocaine in this case originated with the appellant, we are unable to find official overreaching amounting to a violation of the appellant's due process rights.

Pointing to factors such as good work record and rehabilitive potential, the appellant also argues his punitive discharge is inappropriately severe. Again, we disagree. We have stressed that a conviction for a drug offense "can result in a sentence that is both severe and long-standing." *United States v. Holt,* 28 M.J. 835, 836 (A.F.C.M.R. 1989); *see also United States v. Smith,* 28 M.J. 863 (A.F.C.M.R. 1989). As a 24-year-old noncommissioned officer with nearly 7 years of service, the appellant knowingly possessed cocaine. He recieved a fraction of the maximum punishment he faced, which included a dishonorable discharge and confinement for 5

years. Considering all the circumstances before us, we find the punitive discharge and the rest of the approved sentence entirely appropriate.

Therefore, having examined the record of trial, the assignment of errors, and the government's reply thereto, we conclude that the findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudical to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and sentence are

AFFIRMED.

[SEAL OMITTED]

OFFICIAL

/s/ Naomi D. Allen
NAOMI D. ALLEN
TSgt, USAF
Chief Court Administrator, AFCMR

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